NO. 80-317

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

V.

WALTER CAMENISCH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the Court of Appeals misconstrued this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), so as to require that The University of Texas provide auxiliary services and affirmative action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and assume the financial and administrative burdens of furnishing a sign language interpreter for a deaf graduate student to assist him in his classroom work.

2. Whether the Court of Appeals correctly held that Section 504 of the Rehabilitation Act of 1973 confers a private cause of action in favor of handicapped persons.

3. Whether, assuming arguendo that Section 504 requires auxiliary services and affirmative action which impose a financial burden on an institution of higher education and further that Section 504 confers a private cause of action in favor of the handicapped, the handicapped plaintiff must show that the financial assistance received by the institution was intended to support the particular "program" in which the handicapped plaintiff is enrolled or engaged.

PARTIES TO THE PROCEEDING

In the District Court below, Walter Camenisch, as Plaintiff, brought suit against:

The University of Texas;

Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas;

Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas;

Lorene Rogers, individually and in her official capacity as President of the University of Texas at Austin; and

Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas at Austin.

All of the individuals no longer serve in the capacities described. However, The University of Texas is the real party at interest and no defect as to parties is alleged by Petitioners.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 616 F.2d 127. A copy of the opinion is also included in the Appendix to the Petition. The District Court opinion is not reported but is included in the Appendix to the Petition together with the District Court's judgment. The judgment of the Fifth Circuit and its order denying rehearing is also set out in the Appendix. (The denial of rehearing is reported at 618 F.2d 1389).

JURISDICTION

The opinion of the Court of Appeals was entered on April 28, 1980. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on May 29, 1980. Petition for Certiorari was timely filed on August 25, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1234(1). The Petition was granted on November 3, 1980.

STATUTE INVOLVED

The statute in question in this case is Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; the statute originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6)(29 U.S.C. §706[6]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for nondiscrimination by federal agencies and, after amendment, now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7)(29 U.S.C. §706[7]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the

amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

STATEMENT OF THE CASE

This is a suit brought by Respondent, Walter Camenisch, a deaf graduate student, against Petitioner, The University of Texas at Austin, a state institution of higher education, seeking injunctive relief to compel Petitioner to provide Respondent with a sign language interpreter to assist him in his classroom work at Petitioner University. (A. 4). Respondent contends that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and the Regulations promulgated by the Department of Health, Education & Welfare pursuant thereto require Petitioner to provide such services. (A. 7).

Prior to filing this action, Respondent requested the Petitioner to provide him with a sign language interpreter. The Petitioner denied Respondent's request on the grounds that he did not meet the Petitioner's established criteria for financial assistance to graduate students. (A. 15).

At the hearing in District Court, Respondent testified that the Petitioner had accommodated his handicap at all times by allowing Respondent to have an interpreter in the classroom. (A. 51). That interpreter was paid by Respondent. It was stipulated at the trial that the Petitioner was the recipient of federal funds, but no showing was made that any of the programs or activities in which Respondent took part received federal financial assistance. (A. 30).

The District Court found Section 504 and the HEW Regulations applicable to Respondent's claim and ordered Petitioner to procure and compensate a qualified interpreter to assist Respondent in his classes. (See District Court judgment appended to the Petition). The Petitioner complied with the District Court order, and Respondent posted a bond in order that the Petitioner might be reimbursed in the event that the order of the District Court was set aside on appeal. (A. 70).

The Petitioner appealed from the mandatory injunction entered by the District Court. After briefs had been submitted to the Court of Appeals for the Fifth Circuit by the parties, this Court decided *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), and counsel for both parties were asked to comment by letter briefs and in oral argument upon the possible implications of the *Southeastern Community College* decision upon this case. The Court of Appeals affirmed the District Court, holding that a private cause of action should be implied under Section 504 and that the Petitioner was required to bear the expense of furnishing Respondent with an interpreter, *Southeastern Community College* notwithstanding. The Fifth Circuit denied the University's Motion for Rehearing En Banc, and these certiorari proceedings followed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit, *Camenisch v. The University of Texas, et al., supra*, requiring the University to expend monies to provide an interpreter for a deaf graduate student, completely misconstrued this Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979). Section 504, relied upon by the Court of Appeals to support its determination, merely prohibits discrimination against the handicapped in

programs receiving federal financial assistance. Section 504 does not require a covered institution to expend monies to make programs accessible.

Moreover, Section 504 does not create a private cause of action on behalf of handicapped participants in programs receiving federal financial assistance. The intent of Congress, as evidenced by the plain meaning of the language of 504 and by the legislative history of its amendments and proposed amendments, clearly demonstrate that there is no private right of action to enforce the provisions of Section 504 with respect to state institutions and agencies.

Assuming, arguendo, that Section 504 requires affirmative action by covered state institutions and that a private cause of action may be maintained, a handicapped plaintiff must meet the threshold burden of demonstrating that the program in which he participates receives federal financial assistance before there is an entitlement to relief under Section 504.

ARGUMENT

I.

THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*, 442 U.S. 397, 99 S.Ct. 2361 (1979), SO AS TO REQUIRE THAT THE UNIVERSITY OF TEXAS PROVIDE AUXILIARY SERVICES AND AFFIRMATIVE ACTION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. §794 AND ASSUME THE FINANCIAL AND ADMINISTRATIVE BURDENS OF FURNISHING AN INTERPRETER FOR A DEAF GRADUATE STUDENT TO ASSIST HIM IN HIS CLASSROOM WORK.

The Fifth Circuit held that this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), *did not prohibit* the imposition on Petitioner, the University of Texas at Austin, of the financial and administrative burdens of furnishing an interpreter for Respondent, a deaf graduate student, to assist him in his classroom work. The Fifth Circuit, in construing *Southeastern Community College*, stated that:

> "The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d 127, 132.

The Fifth Circuit further stated that:

> ". . .the Supreme Court's decision in *Southeastern Community College* says only that §504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him for ever realizing the principal benefits of the training. While such a rule obviously needs more clarification, it is clear that, in this case, Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession." 616 F.2d 127, 133.

Such a narrow reading of this Court's decision in *Southeastern Community College* is erroneous because it ignores the clear holding that Section 504 itself does not impose an affirmative action obligation upon Petitioner to provide the requested services and that HEW lacks the authority to create such an affirmative action obligation pursuant to the language of Section 504.

While under *Southeastern Community College* a university might be required to permit a blind student

to tape record lectures where the practice is otherwise forbidden or to permit a deaf student to use an interpreter in the classroom at the student's expense (which was allowed by the Petitioner in this case), *no financial* obligation to provide such a service can be imposed on the Petitioner by virtue of Section 504 of the Rehabilitation Act of 1973.

In *Southeastern Community College*, this Court stated as follows:

> "The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."
>
> * * * *
>
> "Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions [§§601(b), 503(a), 504] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so."
>
> * * * *
>
> "Here neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." 99 S.Ct. 2361, 2369-70.

The Petitioner supports reasonable affirmative action obligations when they are the result of the express will of the Congress, and the Petitioner agrees that it must *accommodate* handicapped students in some cases where no financial outlay is required. However, a reading of the entire Rehabilitation Act of 1973 reveals that Section 504 of the Act was not, and is not, intended to impose financial obligations on the states or state institutions such as Petitioner.

The Rehabilitation Act establishes the Federal Rehabilitation Service Administration and provides for a number of programs to assist the handicapped. Among the services offered are evaluation, counseling, training, restoration, placement and maintenance of the handicapped, and architectural and transportation barriers are also addressed. Federal monies are appropriated to carry out these services.

As the final provision of the Rehabilitation Act, Congress added Section 504 (29 U.S.C. §794), which provides:

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

This is all Congress said on the subject of programs receiving federal financial assistance and the participation of handicapped persons in these programs. Nothing was said concerning the enforcement responsibilities of this legislation or the consequences of any violation of the statute. No monies were appropriated by Congress to fund any affirmative action or reasonable accommodation steps or processes

which may be required to permit the handicapped to engage in federally assisted programs which may be inaccessible or unavailable unless some accommodation is made in favor of the handicapped.

On April 29, 1976, Executive Order No. 11914 was issued which dealt with non-discrimination in federally assisted programs. Therein, the President conferred on the Department of Health, Education & Welfare (an action questioned by the Petitioner), the power to interpret, administer and enforce the provisions of Section 504. However, the Executive Order did not direct HEW to construct an affirmative action program under the aegis of Section 504.

In late 1978, Section 504 was amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §119, 92 Stat. 2982 (1978), so as to prohibit discrimination by federal agencies and to require that such agencies indicate compliance by the establishment of regulations to implement the non-discrimination mandate. *No such requirement was imposed by Congress on recipient agencies, other than federal, to take any affirmative compliance steps.*

At the same time that Section 504 was amended to include federal agencies, new handicapped programs were enacted to remove architectural and transportation barriers, to provide employment opportunities for the handicapped, and to provide for "independent living" by handicapped persons. [Pub. L. 95-692, codified as 29 U.S.C. §§794(b), 795 and 796.] While federal monies were provided for these new programs, Congress again failed to make federal appropriations to provide for accommodation of the handicapped in federally assisted programs covered by Section 504.

The Fifth Circuit, In *Camenisch, supra*, found that "HEW regulations [45 C.F.R. §84.44(d)(2) 1979] require

institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters." 616 F.2d 127, 133. The Fifth Circuit further stated that "the University denied Camenisch his request for sign language interpreter services on the grounds that he did not meet the University's established criteria for financial assistance to graduate students." 616 F.2d 127, 129.

Clearly, the issue before this Court is not a refusal to accommodate a handicapped student, but, instead, whether an "entitlement" exists pursuant to Section 504 for handicapped students which automatically imposes an onerous financial burden on institutions of higher education to meet affirmative action obligations created, not by the Congress, but by HEW through regulations such as 45 C.F.R. §84.44(d)(2) 1979.[1] If such an "entitlement", as has been imposed by HEW, is upheld by this Court, the limited resources committed to higher education by the State of Texas must be diverted and diluted to accommodate a costly quasi-rehabilitation role through the provision of "auxiliary aids", including sign language interpreters. In addition to the financial burden involved, the administrative burden of recruiting qualified sign language interpreters capable of accurately functioning in a myriad of educational specialties, each with its own technical language, is not an insignificant problem.

[1]In a cost survey prepared for HEW, the estimated annual pecuniary cost of compliance with the act has been set at 3.2 billion dollars. D. O'Neill, *Discrimination Against Handicapped Persons--The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance*, at 65 (May 4, 1977)(unpubished report prepared for the HEW Office for Civil Rights under Orders NO. SA-4141-76 and No. SA-2471-77).

Regulations promulgated by the Department of Health, Education & Welfare which create an entitlement for handicapped students and impose costly affirmative action obligations upon higher education constitute an unauthorized extension of the obligations imposed by Section 504. *Southeastern Community College v. Davis, supra.*

The affirmative action provisions of the HEW Regulations in issue in this case have no statutory basis, and they are invalid. As this Court noted in *United States v. Larionoff*, 431 U.S. 864, 873, n. 12 (1977):

> "12. The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is... [only] the power to adopt regulations to carry into effect the will of the Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

It is patent that Section 504 imposes no such financial liability upon those state institutions and agencies covered by the Act, and the Court of Appeals' decision in this case is erroneous in holding that it does.

II.

THE COURT OF APPEALS INCORRECTLY HELD THAT SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF HANDICAPPED PERSONS.

The Fifth Circuit Court of Appeals found that Section 504 creates a private, individual right of action for equitable relief, relying upon the decision of *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) and its progeny -- *Kampmeir v. Nyquist*, 553

F.2d 296 (2nd Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); and *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979). It is interesting to note that the Seventh Circuit recently restated its position on whether a private cause of action exists pursuant to Section 504 in *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980) as follows:

> "Implicit in plaintiff's argument on his Section 504 claim is the assumption that this Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), recognized that a private right of action may be implied under that section. This assumption by Plaintiff, as well as by courts analyzing *Lloyd*, may reflect an over-simplified view of that case and ignores the limitations we there expressed."
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> * * * *
>
> "We expressly reserved the question whether a private right of action would still be available after final regulations were promulgated." 629 F.2d 1226, 1229-30.

The Seventh Circuit also stated, in a footnote to the *Simpson* case, that ". . .we note that the Supreme Court has yet to express an opinion on whether a private right of action may be implied under §504." 629 F.2d 1226, 1230 n. 7. Indeed, this Court, in a footnote to *Southeastern Community College v. Davis, supra*, expressly declined to rule on the issue of whether a private cause of action should be implied from the language of Section 504. See 99 S.Ct. 2361, 2366 n.5.

In the case of *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979), this Court held that the plaintiff had a right under Title IX of the Education Amendments of 1972 to pursue a private cause of action against the defendant university. In a concurring

opinion, Justice Rehnquist, joined by Justice Stewart, cautioned future litigants as follows:

> "I fully agree with the court's statement that '[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.' *Ante*, at 1967. It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." 99 S.Ct. 1946, 1968.

In his dissenting opinion in *Cannon*, Justice White, joined by Justice Blackman, stated that "...to the extent the Court based its holding on the proposition that an individual protected by a statute always has a right to enforce that statute, it was in error; and a dubious interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent." 99 S.Ct. 1946, 1972.

And finally, Justice Powell, in his dissenting opinion in *Cannon*, questioned the validity of the four-pronged test outlined in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975) stating that the *Cort* analysis has been used to "deflect the relevant inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement", citing twenty examples of circuit court of appeals' decisions since the *Cort* decision which have implied private actions from federal statutes. 99 S.Ct. 1946, 1980.

Justice Powell also cautioned future litigants as follows:

> "Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes." 99 S.Ct. 1946, 1985.

The Petitioner respectfully urges the court to renounce the *Cort* test in determining whether a private cause of action exists in remedial, anti-discrimination congressional enactments because of the difficulties experienced by the federal courts in attempting to apply the test.

However, without regard to the efficacy of *Cort v. Ash*, there are a number of reasons why Section 504 should be distinguished from Title VI and Title IX in determining whether Section 504 creates a private cause of action.

First, it should be noticed that Congress has consistently rejected all bills and amendments that would allow the handicapped a private cause of action under Title VII of the Civil Rights Act of 1964 by including handicapped individuals among those protected against employment discrimination.[2]

[2]Bills and amendments to include the handicapped within Title VII which have been rejected are H.R. No. 7423, 96th Cong. 2nd Sess. (1980); S. Nos. 346, 446, H.R. Nos. 373, 609, 1326, 3345, 96th Cogn. 1st Sess. (1979); H.R. Nos. 998, 1986, 2136, 2904, 4775, 7165, 6577, 6692, 8152, 8153, 9107, 9761, 9860, 11519, 11520, 95th Cong. 2nd Sess. (1978); H.R. Nos. 264, 461, 1107, 1200, 1995, 95th Cong. 1st Sess. (1977); S. Nos. 1311, 1757, H.R. Nos. 1346, 1886, 2515, 3497, 4624, 4625, 4626, 5016, 7061, 7754, 7758, 7946, 8028, 8417, 12541, 94th Cong. (1975-76); S. No. 1780, H.R. Nos. 1120, 2685, 10,960, 11,986, 11,987, 12,654, 12,916, 13,199, 13,200, 93rd Cong. (1973-74); H.R. 10,962, 92nd Cong. (1972).

Second, it is significant that the Civil Rights Attorneys Fee Awards Act of 1976, which amended 42 U.S.C. §1988, fails to mention Section 504 as an applicable statute for obtaining attorneys fees in the enforcement, through private litigation, of an individual's civil rights, suggestive again that Congress intended that no private cause of action be conferred by Section 504. (And, notice is made that Title IX is listed in the Fee Awards Act as a statute supporting the award of attorneys fees to prevailing litigants).

Third, if Congress intended to grant individuals a private cause of action under Section 504, it could and would have done so in clear and unequivocal language. Compare Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401, *et seq.*, providing that an aggrieved individual can bring an action in the state or federal courts, albeit only after the termination of administrative procedures. And, compare the Age Discrimination Act of 1975, 42 U.S.C. §6101, *et seq.*, where Congress specifically amended Section 6104 of the Act (Pub. L. 95-478) in October, 1978, to provide for a private cause of action following the exhaustion of administrative remedies.

Fourth, HEW, the agency first charged with the enforcement of Section 504, did not consider that Section 504 created a private cause of action. Notice should be taken that when Congress amended the Age Distrimincation Act, HEW issued proposed Regulations on December 1, 1978, to establish a procedure for the newly created private cause of action. 45 C.F.R. Part 90, Section 90.50(a)-(c). In contrast, despite the November, 1978, amendments to the Rehabilitation Act of 1973, HEW has expressly declined to establish a similar procedure for a private cause of action pursuant to Section 504, noting that it did not have the power to create a private cause of action without statutory authority. See Appendix A, Page 378, Title 45, C.F.R. Part 84.

It seems crystal clear that Congress has not intended to create a private cause of action to enforce Section 504.[3] This Court should follow the dictates of Congress and find that no private right of action exists under Section 504.

III.

ASSUMING ARGUENDO THAT SECTION 504 REQUIRES AUXILIARY SERVICES AND AFFIRMATIVE ACTION WHICH IMPOSE A FINANCIAL BURDEN ON AN INSTITUTION OF HIGHER EDUCATION, AND FURTHER THAT SECTION 504 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF THE HANDICAPPED, THE PLAINTIFF MUST SHOW THAT THE FINANCIAL ASSISTANCE RECEIVED BY THE INSTITUTION WAS INTENDED TO SUPPORT THE PARTICULAR "PROGRAM" IN WHICH THE HANDICAPPED PLAINTIFF IS ENROLLED OR ENGAGED.

Section 504, 29 U.S.C. §794, prohibits discrimination against otherwise qualified handicapped individuals "under any program or activity receiving federal financial assistance." Similar language appears in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In this case, the Petitioner received federal financial assistance. The type of aid and for what purpose was not disclosed. Certainly, there was no showing or proof that

[3]The will of Congress in the case of Section 504 could not be more clearly shown unless Congress expressly stated that "no private cause of action is created." However, the judiciary should not impose such a requirement upon Congress. Instead, the courts should follow the policy of denying a private cause of action unless Congress has expressly so provided.

any of the programs or activities engaged in by Respondent received financial aid from the federal government.

The Court of Appeals for the Fourth Circuit has held that there is no Section 504 coverage unless the program in which discrimination is asserted has received federal financial assistance. *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) cert. denied, 442 U.S. 947 (1979). The Eighth Circuit has followed the *Trageser* case in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), cert. denied, ____ U.S. ____, 49 U.S.L.W. 3251.

The Fifth Circuit Court of Appeals has required a showing of federal aid to a specific program and a further showing of discrimination within the particular program receiving federal monies in order to trigger coverage under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. *Board of Public Institutions of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

To this same philosophical effect, in determining coverage under Title IX, are the decision in *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Isleboro School Community v. Califano*, 593 F.2d 424 (1st Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Junior College District of St. Louis v. Califano*, 593 F.2d 114 (8th Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Seattle University v. United States Department of HEW*, 621 F.2d 992 (9th Cir. 1980) cert. granted, ____ U.S. ____, 49 U.S.L.W. 3401; and *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980).[4]

[4]The Fourth Circuit has affirmed, without an opinion, a decision of a district court that reached an opposite conclusion and determined that coverage under Title VI is generated by any federal financial assistance to an institution without regard to whether a particular program or activity that forms the genesis of a

In the recent case of *Dougherty County School System v. Harris, supra,* the Fifth Circuit restated the program-specific philosophy it first postulated in the *Finch* case, supra, as follows:

> "Even according great latitude to the Secretary, we cannot find sanction in the statute for his conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly." 622 F.2d 735, 737.

In the case now before the Court, Petitioners assert that there has been no showing that the specific programs and activities in which Respondent took part received federal financial assistance. This showing is a threshold predicate to be established by any plaintiff before any action by a district court can be taken, including the entry of a preliminary injunction. There was, accordingly, no jurisdiction for the District Court to consider this case and require the expenditure of funds by the Petitioner.

lawsuit has received federal monetary aid. *Bob Jones University v. Johnson,* 396 F.Supp. 597 (D.C.S.C. 1974), aff'd 529 F.2d 514 (4th Cir. 1975). However, apparently, the program-specific argument was not raised by the litigants. Indeed, the decision in *Bob Jones University* may have been overruled by the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center, Inc., supra.*

CONCLUSION

Petitioner prays that this Court reaffirm its decision in *Southeastern Community College v. Davis* and reiterate that Section 504 does not require a covered institution to take affirmative steps, such as providing a sign language interpreter for Respondent, in order to enable the handicapped to participate in institutional programs. Petitioner further prays that this Court hold that Section 504 confers no private cause of action in favor of the handicapped.

In the alternative, should this Court hold that Section 504 does provide a private cause of action and does impose an affirmative burden upon institutions to provide services of the kind requested by Respondent, Petitioner prays that such cause be remanded to the District Court with instructions that Respondent must first prove that the program in which he was enrolled at The University of Texas at Austin received federal financial assistance in order to trigger coverage under Section 504.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General, do hereby certify that three copies of the foregoing Brief for Petitioner to the United States Court of Appeals for the Fifth Circuit were served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorneys of record for Respondent: Marc P. Charmats, National Association of the Deaf Legal Defense Fund, P.O. Box 1793, Seventh Street and Florida Avenue, N.E., Washington, D.C. 20002; Charles Smith, 812 San Antonio, Suite G-11, Austin, Texas 78701, on this the _____ day of December, 1980.

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